Toh See Wei v Teddric Jon Mohr & Anor

HIGH COURT (PENANG) — SUIT NO 22NCVC-574–08 OF 2012
ABDUL WAHAB JC
8 FEBRUARY 2017

Tort — Breach of confidence — Invasion of privacy — Whether there was breach of confidence — Plaintiff employee of hospital sued his superiors at workplace contending they hacked into his private email account, retrieved his emails and produced them before hospital's top management — All emails plaintiff sent to third parties had content 'injurious' to hospital, its administration and defendants' character — Whether emails neither private nor confidential — Whether there was no evidence defendants hacked into plaintiff's email account — Whether defendants had not acted unlawfully in publishing emails because public interest demanded their disclosure — Whether plaintiff 's claims to breach of confidence and invasion of privacy unsustainable when he himself sent emails to third parties — Whether equity could not afford protection to plaintiff as he himself acted 'with unclean hands' by breaching duties of fidelity and confidence to his employers by circulating injurious/defamatory emails about them to third parties

At all material times, the plaintiff was the chief operating officer of the Penang Adventist Hospital ('PAH') while the first defendant ('D1') was a trustee cum chief executive officer/president of PAH and the second defendant ('D2') was the vice-president of medical affairs. The plaintiff alleged that D1 had hacked into his private email account and then downloaded from there and printed out numerous emails which the plaintiff had sent to third parties. The plaintiff alleged that D1 had produced several of those emails at a meeting of PAH's board of trustees and that D2 had obtained copies of those emails from D1 and published them to at least five other persons. The plaintiff said that after the defendants had gotten hold of the emails, he was summarily dismissed by D1 from his employment at PAH without being given any show-cause notice or an opportunity to be heard. The grounds for his summary dismissal were that through those emails, the plaintiff had breached his contract of employment and violated PAH's disciplinary rules by disclosing confidential information about the hospital and its administration to outside third parties, spread malicious and defamatory statements about D1 and PAH and also conspired with others to have the administration of the hospital taken away from D1. In his instant suit, the plaintiff sought against the defendants, inter alia, RM2m in general damages and an injunction to restrain them from publishing, or otherwise using, the emails or the information contained therein. The plaintiff

premised his suit on the torts of invasion of privacy and breach of confidence. The defendants denied that they were involved in any way with the hacking of the plaintiff's private email account. D1, in fact, said he received hard copies of the emails in an unmarked envelope from an unknown person. The defendants also argued that Malaysian law did not recognise the tort of invasion of privacy. The defendants said they did not breach any duty of confidence to the plaintiff because the contents of the emails were not personal or confidential but spoke entirely of PAH and its administration and made allegations against the defendants. The defendants said by virtue of the positions they held in PAH, they were duty-bound to bring the emails to the attention of PAH's board of trustees and also to produce them in a civil suit which they later filed against some members of the board of trustees for suspending/dismissing them from office in PAH.

Held, dismissing the claim:

(1) On balance of probabilities, the plaintiff failed to prove his claim against the defendants (para 77).

(2) The defendants did not owe the plaintiff any duty of confidentiality. There was no evidence that the defendants were involved in the hacking of the emails. The plaintiff admitted that all the emails were work-related or concerned affairs of the hospital and some about the defendants and that apart from the publication of the emails at the board of trustees meeting and by way of affidavit in the court proceedings, they were not published elsewhere. The defendants had not acted unlawfully in publishing the information in the emails that were in their possession (see paras 63–64 & 76).

(3) The plaintiff's conduct in respect of the information in the emails was improper and the court was entitled to refuse the reliefs he had prayed for. The plaintiff's culpability was relevant to his invasion of privacy claim because it was not fair to allow the plaintiff to rely on his privacy rights. Equity could not afford protection to the plaintiff when he had emailed to his friends wrongful and offensive information about the defendants and the hospital. The emails had humiliated, severely embarrassed and infringed the privacy of the defendants. On the facts, the plaintiff's protection to privacy ought to be forfeited (see paras 67 & 72).

(4) The plaintiff's emails contained 'injurious' material as to the defendants' character and the affairs of the hospital. Therefore, it was in the public interest that it had to be disclosed. The defendants had shown that there was a compelling public interest that justified the disclosure of the emails to the board of trustees and in the court proceedings. Public interest in the disclosure outweighed public interest in the preservation of private and confidential information. As an employee of PAH and as a

subordinate to the defendants, the plaintiff was subject to the duty of fidelity and good faith which demanded that he was loyal to his employer and refrained from misusing or disclosing confidential information to third parties (see paras 70–71).

(5) The law of confidence might have applied if the information had substantially concerned the plaintiff. Here, the email information did not concern the plaintiff at all. There was no publication about him, no evidence of any harm or serious effect on the plaintiff or that he was embarrassed by the publication. The breach of confidence claim could not be sustained because the plaintiff had himself sent the email information to his friends. In such circumstances, it was not possible to contend that the emails were private or confidential. The plaintiff lost any right to privacy once he revealed the information to third parties (see paras 73–75).

[Bahasa Malaysia summary

Pada setiap masa matan, plaintif ialah ketua pegawai operasi Hospital Adventist Pulau Pinang ('HAPP') manakala defendan pertama ('D1') ialah pemegang amanah merangkap ketua pegawai eksekuitf/presiden HAPP dan defendan kedua ('D2') ialah naib presiden urusan perubatan. Plaintif mengatakan bahawa D1 telah menggodam ke dalam akaun emel peribadiya dan kemudian memuat turun daripada situ dan mencetak pelbagai emel yang telah dihantar oleh plaintif kepada pihak-pihak ketiga. Plaintif mengatakan bahawa D1 telah mengemukakan beberapa emel tersebut di mesyuarat lembaga pemegang amanah HAPP dan bahawa D2 telah memperoleh salinan emel-emel tersebut daripada D1 dan menunjukkannya kepada lebih kurang lima orang lain. Plaintif mengatakan bahawa selepas defendan-deefndan mendapat emel-emel tersebut, dia telah dipecat terus oleh D1 daripada pekerjaannya di HAPP tanpa diberikan apa-apa notis tunjuk sebab atau peluang untuk didengar. Alasan-alasan untuk pemecatan terusnya adalah bahawa melalui emel-emel tersebut, plaintif telah melanggar kontrak pekerjaannya dan melanggar peraturan-peraturan tatatertib HAPP dengan mendedahkan maklumat sulit tentang hospital dan pentadbirannya kepada pihak-pihak ketiga yang luar, menyebarkan kenyataan berniat jahat dan berunsur fitnah tentang D1 dan HAPP dan juga berkomplot dengan yang lain agar pentadbiran hospital diambil daripada D1. Dalam guamannya, plaintif memohon terhadap defendan-defendan, antara lain, RM2 juta untuk ganti rugi am dan injunksi untuk menyekat mereka daripada menyiarkan, atau sebaliknya menggunakan, emel-emel atau maklumat yang terkandung di dalamnya. Plaintif mempremiskan guamannya atas tort pencerobohan privasi dan pelanggaran keyakinan. Defendan-defendan menafikan bahawa mereka terlibat dalam apa carapun dengan penggodaman akaun emel peribadi plaintif. D1, bahkan, mengatakan dia telah menerima salinan keras emel-emel itu dalam sampul surat tidak ditanda daripada seseorang yang tidak dikenali.

Defendan-defendan juga berhujah bahawa undang-undang Malaysia tidak mengiktiraf tort pencerobohan privasi. Defendan-defendan mengatakan mereka tidak melanggar apa-apa kewajipan keyakinan kepada plaintif kerana kandungan emel-emel tersebut bukan bersifat peribadi atau sulit tetapi menyatakan keseluruhannya tentang HAPP dan pentadbirannya dan membuat dakwaan terhadap defendan-defendan. Defendan-defendan mengatakan berdasarkan jawatan yang dipegang oleh mereka dalam HAPP, mereka mempunyai kewajipan untuk membawa emel-emel tersebut kepada perhatian lembaga pemegang amanah HAPP dan juga mengemukakan mereka dalam guaman sivil yang mana mereka kemudian telah memfailkan terhadap beberapa ahli lembaga pemegang amanah tersebut kerana menggantung/memecat mereka daripada jawatan dalam HAPP.

Diputuskan, menolak tuntutan:

(1) Atas imbangan kebarangkalian, plaintif telah gagal untuk membuktikan tuntutannya terhadap defendan-defendan (lihat perenggan 77).

(2) Defendan-defendan tidak mempunyai apa-apa kewajipan kerahsian terhadap plaintif. Tiada keterangan yang defendan-defendan terlibat dalam penggodaman emel-emel tersebut. Plaintif mengakui bahawa kesemua emel-emel tersebut adalah berkaitan kerja atau berkenaan urusan hospital dan ada tentang defendan-defendan dan bahawa selain daripada penerbitan emel-emel tersebut dalam mesyuarat lembaga pemegang amanah dan melalui afidavit dalam prosiding mahkamah, mereka tidak menerbitkan di tempat lain. Defendan-defendan tidak bertindak menyalahi undang-undang dalam menerbitkan maklumat dalam emel-emel tersebut yang berada dalam milikan mereka (lihat perenggan 63–64 & 76).

(3) Tingkah laku plaintif berkaitan maklumat dalam emel-emel tersebut adalah tidak wajar dan mahkamah berhak untuk menolak relif-relif yang dipohon olehnya. Kebersalahan plaintif adalah relevan terhadap pencerobohan tuntutan privasinya kerana ia adalah tidak adil untuk membenarkan plaintif bergantung kepada hak privasinya. Ekuiti tidak mampu memberi perlindungan kepada plaintif apabila dia telah menghantar emel-emel kepada kawan-kawannya maklumat yang salah dan menyinggung tentang defendan dan hospital. Emel-emel tersebut telah menghina, sangat memalukan dan melanggar privasi defendan-defendan. Berdasarkan fakta tersebut, perlindungan plaintif terhadap privasi patut dilucuthakkan (lihat perenggan 67 & 72).

(4) Emel-emel plaintif mengandungi bahan yang 'injurious' berhubung peribadi defendan dan urusan hospital tersebut. Oleh demikian ia adalah demi kepentingan awam bahawa ia telah didedahkan. Defendan-defendan menunjukkan bahawa terdapat kepentingan awam yang menarik perhatian yang mewajarkan pendedahan emel-emel

tersebut kepada lembaga pemegang amanah dan dalam prosiding mahkamah. Kepentingan awam dalam pendedahan itu melampaui kepentingan awam dalam pemeliharaan maklumat peribadi dan sulit. Sebagai pekerja HAPP dan sebagai orang bawahan kepada defendan-defendan, plaintif adalah tertakluk kepada kewajipan kesetiaan dan berniat baik yang menuntut agar dia setia kepada majikannya dan menahan diri daripada menyalahgunakan atau mendedahkan maklumat sulit kepada pihak-pihak ketiga (lihat perenggan 70–71).

(5) Undang-undang keperibadian mungkin terpakai jika maklumat banyak berkaitan plaintif. Di sini, maklumat emel tersebut tiada kaitan langsung dengan plaintif. Tiada penerbitan tentangnya, tiada keterangan tentang apa-apa bahaya atau kesan yang serius terhadap plaintif atau bahawa dia telah dimalukan oleh penerbitan itu. Pelanggaran tuntutan keyakinan tidak boleh dikekalkan kerana plaintif sendiri telah menghantar maklumat emel itu kepada kawan-kawannya. Dalam keadaan berikut, ia tidak mungkin untuk dihujahkan bahawa emel-emel tersebut adalah peribadi atau sulit. Plaintif telah hilang apa-apa hak terhadap privasi setelah dia mendedahkan maklumat tersebut kepada pihak-pihak ketiga (lihat perenggan 73–75).]

Notes

For a case on invasion of privacy, see 12(1) *Mallal's Digest* (5th Ed, 2015) paras 28.

Cases referred to

A v B plc and another [2003] QB 195, CA (refd)

Attorney General v Guardian Newspapers and others (No 2) [1988] 3 All ER 545; [1990] 1 AC 109, Ch D (refd)

Author of a Blog v Times Newspapers Ltd [2009] EWHC 1358 (QB), QBD (refd)

Beatrice a/p AT Fernandez v Sistem Penerbangan Malaysia & Ors [2005] 3 MLJ 681, FC (consd)

Campbell v MGN Ltd [2004] UKHL 22, HL (refd)

Coco v AN Clark (Engineers) Ltd [1969] RPC 41, ChD (refd)

Creative Purpose Sdn Bhd & Anor v Integrated Trans Corp Sdn Bhd & Ors [1997] 2 MLJ 429, HC (refd)

Dato' Vijay Kumar Natarajan v Choy Kok Mun [2010] 7 MLJ 215, HC (refd)

Dr Bernadine Malini Martin v MPH Magazines Sdn Bhd & Ors [2006] 7 MLJ 561; [2006] 2 CLJ 1117, HC (refd)

Google Inc v Vidal-Hall and others [2015] EWCA Civ 311, CA (refd)

Holyoake v Candy and another [2017] EWHC 52 (QB), QBD (refd)

Hubbard and another v Vosper and another [1972] 1 All ER 1023, CA (refd)

Initial Services Ltd v Putterill and Another [1967] 3 All ER 145, CA (refd)

Kaye v Robertson and Another (1990) Times, 21 March; [1991] FSR 62, CA (refd)
Lee Ewe Poh v Dr Lim Teik Man & Anor [2011] 1 MLJ 835; [2011] 4 CLJ 397; [2010] 1 LNS 1162, HC (refd)
Lew Cher Phow @ Lew Cha Paw & Ors v Pua Yong Yong & Anor [2011] MLJU 1195, HC (refd)
Lew Cher Phow @ Lew Cha Paw & Ors v Pua Yong Yong Anor Pua Keng Siang [2009] MLJU 1331; [2009] 1 LNS 1256, HC (refd)
M Mohandas Gandhi & Anor v AmBank (M) Berhad & Anor [2014] 1 LNS 1025, HC (refd)
Malone v Metropolitan Police Commissioner [1979] Ch 344, Ch D (refd)
Maslinda bt Ishak v Mohd Tahir bin Osman & Ors [2009] 6 MLJ 826; [2009] 6 CLJ 653, CA (refd)
Mohamad Izaham bin Mohamed Yatim v Norina bt Zainol Abidin & Ors [2017] 7 MLJ 772, HC (refd)
OBG Ltd and others v Allan and others; Douglas and others v Hello! Ltd and others; Mainstream Properties Ltd v Young and others [2007] UKHL 21, HL (refd)
PJS v News Group Newspapers Ltd [2016] 4 All ER 554; [2016] UKSC 26, SC (refd)
R Rajagopal v State of TN 1995 AIR 264; 1994 SCC (6) 632, SC (refd)
Sherinna Nur Elena bt Abdullah v Kent Well Edar Sdn Bhd [2014] 7 MLJ 298, HC (refd)
Sivarasa Rasiah v Badan Peguam Malaysia & Anor [2010] 2 MLJ 333; [2010] 3 CLJ 507, FC (refd)
Ultra Dimension Sdn Bhd v Kook Wei Kuan [2001] MLJU 751; [2004] 5 CLJ 285, HC (refd)

Legislation referred to

Computer Crimes Act 1997 s 8
Evidence Act 1950 s 114(a)
Federal Constitution art 5(1)
Legal Profession Act 1976 s 46A(1)

YC Wong (HY Ho with him) (YC Wong) for the plaintiff.
Mureli Navaratnam (YC Ong and Eric Augustine with him) (Mureli Navaratnam & Co) for the defendants.

Abdul Wahab JC:

INTRODUCTION

[1] In this suit the plaintiff claims against the defendants the following relief:

A (a) general damages of RM2m;

(b) an injunction perpetually restraining the defendants or either of them from publishing or from using in any other manner whatsoever the plaintiff's electronic mails and/or the plaintiff's confidential information or any part thereof contained in the said mails; and

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(c) an order directing the defendants to forthwith deliver up all electronic mails of the plaintiff obtained through an invasion of privacy.

Can someone whose privacy has been violated by another person pursue a civil claim in our courts? Does our law recognise the tort of invasion of privacy and breach of confidence? These are the issues raised in this suit filed by the plaintiff against the defendants.

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FACTS OF THE CASE

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[2] The plaintiff was at all times material to this action, the Chief Operating Officer ('CEO') of Penang Adventist Hospital ('PAH') and employee of PAH and subordinates of the defendant, presently holding the position of Chief Executive Officer ('CEO') of PAH. He was appointed to this position on 6 December 2011 by the Board of Trustees of PAH.

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[3] The first defendant was at the material times a trustee and CEO/President of the Penang Adventist Hospital. The second defendant had been, at all material times the Vice President of Medical Affairs ('chief medical officer') of PAH. The first defendant had been subsequently dismissed as CEO of PAH with effect from 29 August 2011, whereas the second defendant who had been suspended from services on 29 August 2011 was also subsequently dismissed from his position on 12 July 2012.

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G **[4]** The plaintiff asserted that while he was overseas on or about 7 July 2011, he had suspected that his private e-mail account with the address seeweitoh@hotmail.com had been unlawfully and without his consent hacked into and diverted to several other accounts. He had then lodged a complaint with 'Window's Line Team' (in the USA) and proceeded to reset his account's password. The plaintiff was terminated summarily by the first defendant over emails which were communicated by him to various people within PAH (Pastor Jan Bekker and Pastor Joshua Mok) and outsiders of PAH (Dr Shee Soon Chew and Kelvin Tan). The board of trustees of PAH had held a meeting on 21 July 2011 where, amongst other matters, the plaintiff's termination of service as CEO by the first defendant was reviewed.

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[5] In the board of trustees of PAH meeting held on 21 July 2011, the first defendant referred to the contents, and also showed the others who were present (including the plaintiff) bundles of printouts of emails from the

plaintiff's electronic mailbox. The first defendant was alleged to have accessed the plaintiff's mailbox and had about a thousand of such plaintiff's emails with him. At the meeting on the 21 July 2011, the second defendant referred to and acknowledged that he had been privy to the contents of those plaintiff's emails. In the same meeting, the plaintiff was allowed to, for the record, resign instead of be terminated.

[6] On 29 August 2011 the board of trustees dismissed the first defendant as the CEO of PAH and suspended the second defendant as Chief Medical Officer of PAH. The first and second defendants thereafter instituted an action against some members of the board of trustees of PAH originally in Alor Setar High Court vide Civil Suit No 22NCVC-01–09 of 2011, which suit was subsequently transferred to Penang High Court and registered as Civil Suit No 22NCVC-764–12 of 2011. The plaintiff claimed that some 20 over plaintiff's emails were produced and exhibited by the first defendant in that suit instituted by the defendants against third parties. Both defendants further filed another proceeding in Penang High Court vide Civil Suit No 22NCVC-132–02 of 2012. The plaintiff was not a party to the two Penang High Court Suit Nos 22NCVC-764–12 of 2011 and 22NCVC-132–02 of 2012.

[7] The plaintiff only commenced this suit one year after his termination of service. His explanation for the delay was, he had waited for Window's Live Team's report to his complaint before filing any action. The plaintiff lodged a police report in the USA on 7 May 2012 and later he lodged a police report in Penang on 15 May 2012.

[8] The plaintiff claimed that the acts of the defendants constitute an invasion of the plaintiff's right to privacy as well as a breach of their duty of confidence to the plaintiff.

THE PLAINTIFF'S CASE

[9] Before I examine the law and deal with the legal issues that I need to determine, I need to set out briefly the plaintiff's case, the defendant's case and the relevant facts.

[10] The plaintiff claimed that he had suffered much distress, loss and also damage to his reputation by the first defendant's acts of wrongfully hacking into his private electronic mailbox, the unauthorised extraction of printouts there from and the use and/or the further threatened use of the plaintiff's private email account with the address seeweitoh@hotmail.com. The plaintiff

claimed that the second defendant without the consent of the plaintiff, obtained copies of the said emails from the first defendant and published them to at least five other persons.

[11] A perusal of the amended statement of claim shows that the plaintiff seeks general damages of RM2m; permanent injunctive relief restraining the defendants from publishing/from using in any other manner whatsoever the plaintiff's electronic matters (emails) and/or the plaintiff's confidential information contained in the said emails. The plaintiff further seeks for an order directing the defendant's to forthwith deliver up the emails obtained through an invasion of the plaintiff's privacy.

THE DEFENDANT'S CASE

[12] There are serious disagreements by the defendants as to the plaintiff's case. The contentions of the defendants in their amended statement of defence amongst others:

(a) the defendants deny that they have hacked into the plaintiff's email account;

(b) the laws of Malaysia did not recognise a cause of action in tort for invasion of privacy;

(c) any information contained in the said emails were not confidential and the plaintiff failed to particularise the same;

(d) the contents of the said emails show proof of the suspected misconducts of wrongdoings of the plaintiff against the Penang Adventist Hospital (PAH) by exposing/sharing the information to third parties outside the hospital; lowering and putting into disruptive the position of the President/Chief Executive officer by conspiring with people within and outside PAH with the intention to take over the administration of the PAH from the President/Chief Executive officer and spreading malicious information about the administration of PAH and it's President/Chief Executive Officer; and

(e) emails do not contain any personal information but in fact involve matters relating to the said company and PAH, particularly by the plaintiff's wrongdoing in PAH and any privacy rights in the said emails have been waived by the plaintiff himself.

CAUSE OF ACTION

[13] The plaintiff's suit against the defendants is founded on two cause of action, namely the right to privacy and breach of confidence. It is significant to note that the right to privacy and breach of confidence was an equitable remedy

and equity traditionally fasten on the conscience of one party to enforce equitable duties. Before dealing with the law of each cause of action separately, let me deal with the evidence adduced by both parties.

THE EVIDENCE

[14] Witness statements were filed on behalf of the plaintiff by: Chan Lai Seong ('Joyee'); Loh Sok Hong ('Esther'); Francis Tubol Anak Amer; Toh See Wei; and Jan Bekker. They were all cross-examined on their statements.

[15] Witness statements on behalf of the defendants were filed by: Teddric Jon Mohr and Alfred Charles Roey.

[16] I will address some of the relevant evidence when considering the issues raised in this trial. However, much of the evidence in this case directed to issues raised by both parties: (1) whether the first defendant (by himself or by his agent) hacked into the plaintiff's electronic mailbox account, seeweitoh@hotmail.com, downloaded and printed out emails from the mailbox, and published some of the emails at a meeting of the board of trustees of PAH held on 21 July 2011; (2) whether the defendants used 20 over emails in the Penang High Court Suit No 22NCVC-764–12 of 2011; (3) whether the second defendant without the consent of the plaintiff, obtained the copies of the said emails from the first defendant and published them to at least five other persons; (4) what was the motive of the plaintiff in bringing this claim; and (5) whether there was breach of confidence when there was publication by the defendants.

[17] The evidence shows that email account seeweitoh@hotmail.com belongs to the plaintiff. The plaintiff testified that it was his personal email and not provided by the PAH. Toh See Wei admitted that on 6 July 2011, he saw his mailbox was hacked and he sent an email to Windows Live Team about the hacking. The plaintiff further testified that on 11 July 2011, when he just arrived from the USA, at the lobby of his residence at Penang, the PAH's human resources director Mr Lee Cheng Poh and the head of PAH security, Christopher Joseph handed him a dismissal letter with immediate effect signed by the first defendant.

[18] When Toh See Wei asked as to the grounds of dismissal as per the letter, though he rejected the accusations, he admitted that the letter stated about his *violations of hospital disciplinary* rules and contract employment:

(a) sharing of confidential information by him to third parties outside the hospital;

(b) undermining the portion of the President (the first defendant) by conspiring with people within and outside the hospital to take over the hospital administration from the first defendant; and

(c) spreading malicious and defamatory information about the hospital administration and that of the first defendant.

[19] The plaintiff said he was shocked and he was never given any notice of show cause or any warning or any opportunity to explain and defend himself. He reported this matter to the President of AHCS and the Chairman of AHCS's board of trustees, Pastor Joshua Wone Mok. He further testified that the Pastor Joshua Wone Mok was shocked too, as the dismissal letter was issued without the knowledge of AHCS's trustees. According to the plaintiff, Pastor Joshua Wone Mok told him that the secomd defendant together with one Ms Lim Mei Huey and one Leslie Hong had seen him at his office in Singapore with some documents which the second defendant claimed those were plaintiff's emails.

[20] Toh See Wei admitted that the first defendant's justification for his dismissal were due to the printouts of his emails. Testimony of the plaintiff shows that the first defendant agreed to take back the letter of dismissal and allowed him to tender a resignation letter instead. It was said by the plaintiff, in August 2011, he was informed by Pastor Mok that the first defendant had reneged on the settlement agreement and all payments were stopped and effectively dismissed without compensation. The plaintiff made a formal complaint of wrongful termination with the industrial relations department and later he was reinstated as CEO of PAH.

[21] With regard to the emails, he admitted that pp 225–251 of CABD are emails from his hotmail account and they are his personal and private email correspondence.

[22] The first defendant in his evidence, categorically denied access or hacking into the plaintiff's email account known as seeweitoh@hotmail.com in mid January 2011, the first defendant received an unmarked envelope by a person unknown which contained printouts of emails of the plaintiff with two individual's namely, one Dr Shee Soon Chiew and one Kelvin Tan who were neither staffs nor members of the hospital. The first defendant was thankful to the whistleblower for bringing the said emails to his attention.

[23] According to him, the contents of the said email printouts were shocking but wholly and completely work related. The first defendant in his testimony said that there was nothing private or personal about these emails save for the fact that it showed and proves that the plaintiff's attempt to commit

a *coup d'etat* to remove the first defendant as CEO of the hospital and effectively shake the very foundation of the hospital's administration. It was further testified that the information contained in the emails as found in pp 226–251 of the CABD were communications by the plaintiff seen to have committed a gross misconduct by disclosing confidential and secret information of the hospital to third parties such as Dr Shee Soon Chiew and Kelvin Tan.

[24] According to the first defendant, emails printouts were exhibited in the affidavit filed in the course of proceedings in Civil Suit No 22NCVC-764–12 of 2011 in the Penang High Court which concerns a legal suit filed by him against certain members of the board for his wrongful removal, which are aligned to the plaintiff and to the plaintiff's overall plan of his removal (as seen in those emails).

[25] The first defendant on 11 July 2011 issued the termination letter to the plaintiff to protect sanctity of the hospital's administration. The charges of misconduct against the plaintiff amongst others, sharing of the hospital's confidential information with third parties outside the hospital undermining the position of the first defendant by conspiring with the people within and outside of the hospital to take over the hospital's administration from the first defendant and also spreading of malicious and defamatory information as to the hospital's administration and about the first defendant. The impugned email printouts were the evidentiary basis and proof the decision to terminate the plaintiff; and the existence of the said emails were deliberated upon and disused during the 21 July 2016 meeting in the presence of the plaintiff. The first defendant testified that the plaintiff never took any action since 21 July 2011–August 2012 and only decided to take action against him in respect of the emails printouts. The first defendant claims that it is the malicious act of the plaintiff to exact revenge on him for being the person who had unearthed the several charges of proven and accepted misconduct of the plaintiff.

[26] With regard to the issue of breach of confidence, the first defendant admitted that he never received the email under any form of onus of confidentiality but on the contrary as a CEO, he was duty bound and owed such a fiduciary duty to unearth and act upon the contents of the said email printouts.

SUBMISSION ON EVIDENCE

[27] I record at the outset my thanks for the extensive written submission learned counsel for both parties. Learned counsel Mr YC Wong for the plaintiff submitted that the first defendant undoubtedly had in his possession copies of the plaintiff's emails soon after the plaintiff's mailbox was hacked, and he obviously was not authorised by the plaintiff to possess such emails. The

plaintiff is inviting this court to presume that the first defendant has obtained unauthorised access to the plaintiff's mailbox unless the contrary is proved by him. They relied on s 8 of the Computer Crimes Act 1997. Section 8 of the Computer Crimes Act 1997 reads:

> A person who has in his custody or control any program, data or other information which is held in any computer or retrieved from any computer which he is not authorized to have in his custody or control shall be deemed to have obtained unauthorized access to such program, data or information unless the contrary is proved.

[28] Learned counsel for the plaintiff submitted that the first defendant's possession of the plaintiff's email printouts soon after the hacking incident give rise to strong presumption that he did obtain unauthorised access to the plaintiff's hotmail account. He relied on s 114(a) of the Evidence Act 1950 which reads as follows:

> The court may presume:
>
> (a) that a man who is in possession of stolen goods soon after the theft is either the thief or has received the goods knowing them to be stolen, unless he can account for his possession; ...

[29] The plaintiff's counsel submitted that the last nail to the first defendant's proverbial coffin is his admission under cross-examination that his staff had printed out the emails on 19 July 2011 in preparation of the board meeting to be held on 21 July 2011, which nullifies all his attempts to explain away his possession of his emails. Finally on the evidence, counsel for the plaintiff asked this court to invoke adverse inference under s 114(a) of the Evidence Act against the defendants' failure to call Robert Appelgate. As far as the motive, plaintiff testified that the first defendant had motive to hack into the plaintiff's email account.

[30] With regard to the second defendant, counsel for the plaintiff submitted there was an admission by the second defendant that he obtained copies of the plaintiff's emails from the first defendant. Also there is no dispute that at the board meeting dated 21 July 2011, the second defendant brought his own stack of the plaintiff's emails and made reference to some of the emails. It is the submission of the plaintiff that they had successfully proved, on a balance of probability, that the first defendant had gained unauthorised access to his personal mailbox and obtained his emails. Learned counsel concluded that, as the mailbox belongs to the plaintiff and contained his private communications, the plaintiff had reasonable expectation of privacy therefore such acts of the first defendant constituted invasion of the plaintiff's privacy.

[31] Learned counsel for the plaintiff also submitted that the acts of the defendants constituted a breach of confidence. The plaintiff submitted since they knew or ought to have known that the contents of such emails were confidential regardless of the way they obtained those emails, they owed a duty of confidence to the plaintiff in respect of contents of the said emails and their communication of the same to others was a breach of such duty.

[32] The summary submission on the evidence of learned counsel for the defendants are:

(a) neither oral nor documentary evidence to show that defendants hacked into the plaintiff's email account;

(b) the plaintiff shared his email password with his secretary;

(c) the plaintiff had not in his pleadings or in his witness statement stated that the first defendant had instructed Robert Appelgate to hack into his account;

(d) s 8 of the Computer Crimes Act 1997 is without basis and irrelevant as there is no prosecution or even investigations against any of the defendants; and

(e) SP4 himself admitted that the emails concerns only work related matters or concerns the hospital/PAH. During defendants' counsel's cross-examination SP4 admitted that it touches the affairs of hospital and what's happening in the hospital.

> Mureli: So all these emails and all the emails all the way up to page 251, all touches in the affairs of hospital and what's happening in the hospitals?
>
> PW4: Yes. Between friends, and there is one I invited someone to my house.

[33] Therefore, the defendants submitted since the emails are concerning the hospital's operations, management and business matters, that here is nothing private or personal of these communications. The defendants seriously submitted that the plaintiff cannot come seeking equity without even disclosing the information is so severely confidential. Merely saying that it is 'private' as it is sharing of information between 'friends' is not good enough to succeed here.

[34] It is the submission of the defendants that the defendants had legitimately acted upon the subject emails before the board meeting in July 2011 and in court proceedings. There is not an iota of evidence of any other unauthorised use or publication by the defendants.

[35] With regard to the cause of action of breach of confidence, the defendant submitted there is no pleading of how a duty of confidence arose between parties or if one was ever owed by the defendants to the plaintiff.

SUBMISSION ON LAW

[36] Learned counsel, Mr YC Wong for the plaintiff submitted that the invasion of privacy is actionable under the law of tort and had been recognised in Malaysia and while there was some uncertainty as to its ambit or scope. He relied on the decisions of: *Lee Ewe Poh v Dr Lim Teik Man & Anor* [2011] 1 MLJ 835; [2011] 4 CLJ 397; *Maslinda bt Ishak v Mohd Tahir bin Osman & Ors* [2009] 6 MLJ 826; [2009] 6 CLJ 653; *Lew Cher Phow @ Lew Cha Paw & Ors v Pua Yong Yong & Anor* [2011] MLJU 1195; and *Sherinna Nur Elena bt Abdullah v Kent Well Edar Sdn Bhd* [2014] 7 MLJ 298. Further the plaintiff relied on the decision of Vernon J on the case of *Lew Cher Phow @ Lew Cha Paw & Ors v Pua Yong Yong & Anor* [2011] MLJU 1195, where His Lordship held that time is right for this country to accept that invasion of privacy is an actionable wrong in this country.

[37] Learned counsel for the plaintiff relied on the remarks of Suriyadi JCA (as he then was) in *Maslinda bt Ishak v Mohd Tahir bin Osman & Ors* [2009] 6 MLJ 826; [2009] 6 CLJ 653 at paras 5–6 where it was said:

> There was abundance of evidence as regards this invasion of privacy, amongst others, his subsequent prosecution for a charge under s 509 of the Penal Code under arrest case C83–494 of 2003. He pleaded guilty and was convicted of it. He was accordingly sentenced to four months jail vide, with the sentence confirmed by the High Court vide a revision. In fact, this issue of the invasion of privacy was never under challenge.
>
> To return to the pleadings, the appellant pleaded that her privacy had been invaded, resulting in her humiliation, trauma and serious mental anguish. She wanted general, aggravated and exemplary damages in the sum of RM5,000,000, interest and costs from the first defendant and the respondents. She pleaded that the officers of the second and third respondents at the material time, had negligently failed to protect her well-being, by allowing the first defendant to snap those photographs. To reiterate, at the end of the trial, the learned judge found for the appellant only as regards the first defendant, but not the rest of the respondents. Neither did the first defendant nor the respondents appeal against that decision.

[38] Reliance was also placed by the plaintiff on the decision of *Sherinna Nur Elena bt Abdullah v Kent Well Edar Sdn Bhd* [2014] 7 MLJ 298 at p 308 para 24 where the court held:

> In Malaysia, the law on the invasion of privacy has developed since then. It is desirable especially in this internet era of Facebook and Youtube where lives can be destroyed by such unwanted invasion of privacy. The High Court at Penang allowed such a claim for invasion of privacy in the case of *Lee Ewe Poh v Dr Lim Teik Man &*

Anor [2011] 1 MLJ 835; [2010] 1 LNS 1162 where it was held that a surgeon must obtain the consent of their female patients before taking photographs of their intimate parts during surgical procedures. Although that case can be categorised as a breach of trust and confidentiality because of the doctor-patient relationship, the High Court expressly allowed the plaintiff's claim which, inter alia, pleaded an invasion of her rights to privacy.

[39] Learned counsel for the plaintiff relied on the High Court case of *Lee Ewe Poh v Dr Lim Teik Man & Anor* [2011] 1 MLJ 835; [2011] 4 CLJ 397 and contends that invasion of privacy is now recognised in Malaysia as a tort. In that case the defendant who was the plaintiff's doctor had whilst performing a surgical procedure for haemorrhoids taken photographs of the private parts without the patient's consent. The High Court in allowing the plaintiff's claim had found that invasion of privacy was recognised tort.

[40] The plaintiff submitted that it is settled law that an infringement of a constitutional right can give to a private law action. Counsel for the plaintiff invited this court to consider that, the right to privacy is a constitutional right. He referred to the case of *Sivarasa Rasiah v Badan Peguam Malaysia & Anor* [2010] 2 MLJ 333; [2010] 3 CLJ 507 and submitted that a violation of this fundamental right gives rise to an action for damages (see *R Rajagopal v State of TN* 1995 AIR 264; 1994 SCC (6) 632). With regard to this issue, the plaintiff submitted that with respect, that *Beatrice a/p AT Fernandez v Sistem Penerbangan Malaysia & Ors* [2005] 3 MLJ 681 is not binding authority to support the defendant's proposition that an infringement of a fundamental right guaranteed in the Federal Constitution does not give rise to a private law action.

[41] With regard to the next cause of action under the law of beach of confidence, counsel for the plaintiff submitted relying on the authority of *Attorney General v Guardian Newspapers and others (No 2)* [1988] 3 All ER 545; [1990] 1 AC 109 and the speech of Lord Nicholls in *Campbell v MGN Ltd* [2004] UKHL 22 submitted that so long as the information concerned is private in nature (instead of the description of the information as 'confidential') and a person receiving the information knows or ought to know that the information is fairly and reasonably to be regarded as confidential, the misuse of such private information by the recipient will give rise to a valid cause of action. They further submitted that the old-fashioned 'breach of confidence' as set out in *Coco v AN CLark (Engineers) Ltd* [1969] RPC 41 now covers any scenario which can be described as 'misuse of private information' as per Lord Nicholls in *Campbell v MGN Ltd*.

[42] The plaintiff submitted that it is the plaintiff's pleaded case that all emails retrieved from his hotmail account are private and confidential.

[43] Learned counsel for the defendants as preliminary point submitted there is no tort of invasion of privacy actionable in accordance to the facts and context of this case (see *Ultra Dimension Sdn Bhd v Kook Wei Kuan* [2001] MLJU 751; [2004] 5 CLJ 285 and *Lew Cher Phow @ Lew Cha Paw & Ors v Pua Yong Yong Anor Pua Keng Siang* [2009] MLJU 1331; [2009] 1 LNS 1256).

[44] The defendants considered three decisions in the High Court and the Court of Appeal (see *Lee Ewe Poh v Dr Lim Teik Man & Anor* [2011] 1 MLJ 835; *Maslinda bt Ishak v Mohd Tahir bin Osman & Ors* [2009] 6 MLJ 826; *M Mohandas Gandhi & Anor v AmBank (M) Berhad & Anor* [2014] 1 LNS 1025). Heavy reliance placed on the decision of Vazeer Alam J in *Mohamad Izaham bin Mohamed Yatim v Norina bt Zainol Abidin & Ors* [2017] 7 MLJ 772 where His Lordship held that:

> The law does not recognise invasion of privacy as an actionable tort ...
>
> Now, even if I were to accept and follow the decisions of the High Court. ... *it is limited to matters of private morality and modesty, I find that such a cause of action is not disclosed on the pleaded facts.*

[45] Finally the defendants argued that a constitutional right is not actionable in a private action (see *Beatrice a/p AT Fernandez v Sistem Penerbangan Malaysia & Ors* [2005] 3 MLJ 681).

PRIVACY

[46] My view is that Malaysians are concerned about their privacy. If a comprehensive poll of Malaysian's view about privacy is to be taken, surely large section of Malaysian people would express concern about their privacy and some might view the computer as a threat to their private lives. At the same time the younger generation are increasingly willing to disclose private feelings, information and photograph everyday on a social networking websites and through other technological websites and through other technological medias such as smart phones.

WHAT IS RIGHT TO PRIVACY?

[47] The right to privacy is a multi dimensional concept. In this modern society, right to privacy has been recognised both in the eye of law and in common parlance. The right to privacy refers to the specific right of an individual to control the collection, use and disclosure of personal information. Personal information could be in the form of personal interests, habits and activities, family records, education records, communication (including mail and telephone) records, medical records, to name a few. An individual could easily be harmed by the existence of computerised data about him/her which is

inaccurate or misleading and which could be transferred for an unauthorised third party at high speed at very little cost. Innovative technologies make personal data easily accessible and communicable and there is inherent conflict between right to privacy and data protection.

[48] In short, the right to privacy means the right to be let alone, the right of a person to be free from unwarranted publicity and the right to live without undue interference by the government or any private individual in matters with which the public is not concerned. The 'right to privacy' is recognised as basic human right in article 12 of the Universal Declaration of Human Rights 1948. Malaysia recognises the rights and liberties of the individual in the Federal Constitution as part of human rights protected by the supreme law of the land. The question is whether there is any right to privacy guaranteed under our Constitution? If such right exists, what is the source and what are the contours of such a right as there is no express provision in our Constitution making provision for the 'right to privacy'.

EMAIL PRIVACY — HACKING

[49] This case is about email privacy. Email privacy is the broad topic dealing with issue of unauthorised access and inspection of electronic mail. This unauthorised access can happen while an email is in transit as well as in a stored on email servers or on a user computer. The plaintiff's claim is the invasion of privacy arose out of alleged hacking of the plaintiff's email account by the defendants or its agents. Hacking is a serious invasion of an individual's privacy. With the growth of highly sophisticated communication technology, the right to privacy is increasingly susceptible to abuse. Hacking means unauthorised access to the computer system. There is no definition for hacking in Computer Crimes Act 1997. In the case of *Creative Purpose Sdn Bhd & Anor v Integrated Trans Corp Sdn Bhd & Ors* [1997] 2 MLJ 429, the High Court in delivering the judgment on computer software programs had this to say at p 449 para G-1:

> Throughout this case, the term 'hacking' has been used by the plaintiffs. It is therefore necessary for me to see if its usage connotes the meaning attributed to it. It is pertinent to note that the term 'hacking' can on the one hand signify the free-wheeling intellectual exploration of the highest and deepest potential of computer systems.

[50] With regard to the issue of whether there was hacking by the first defendant, my findings is that there is no evidence of any hacking by the first defendant because the plaintiff admitted that there is no evidence in documents adduced before this court to show that the first defendant or his agents hacked into his email account.

[51] Traditionally, English common law has not recognised a tort of invasion of privacy. Instead, English courts have developed (in a line of cases including *Campbell v MGN Ltd* [2004] UKHL 22 and *OBG Ltd and others v Allan and others; Douglas and others v Hello! Ltd and others; Mainstream Properties Ltd v Young and others* [2007] UKHL 21, a tort of misuse of private information, which is often described as protecting 'an aspect of privacy' (*Google Inc v Vidal-Hall and others* [2015] EWCA Civ 311).

[52] This protection was initially 'absorbed' into the long standing *equitable action* for breach of confidence (*A v B plc and another* [2003] QB 195). However, it became increasingly clear that breach of confidence and misuse of private information rest on different legal foundations and protect different interests (*Douglas v Hello! Ltd*). Ultimately, misuse of private information was recognised as a distinct tort (*Google Inc v Vidal-Hall*). The latest case to confirm both this position and the English court's approach to the tort in *PJS v News Group Newspapers Ltd* [2016] 4 All ER 554; [2016] UKSC 26.

[53] It is important to note that, in a law review written in 1960, the leading American torts scholar, William Prosser, listed four distinct kinds of invasion of privacy interest as follows:

(a) intrusion upon the plaintiff's seclusion or solitudes, or into his private affairs;

(b) public disclosure of embarrassing private facts about the plaintiff;

(c) publicity which places the plaintiff in a false light into the public eye; and

(d) appropriation, for the defendant's advantage, of the plaintiff's names or likeness.

See William L Prosser, *Privacy*, 48 Cal L Rev 383 (1960) at p 389.

[54] I must say that the learned author's analytical framework is helpful in trying to understand and to make determination when dealing with these types of claims. The complaint in this case by the plaintiff falls within Prosser's first category of invasion of privacy.

DOMESTIC LAW

[55] Is there any law in our statues that structure and enforce privacy obligations? There is no certain legislative namely for invasion of privacy in this country. The tort of invasion of privacy may be emerging in Malaysian law. It is not unheard of. Right to privacy is not enumerated as a fundamental right in our constitution. The right to privacy though curiously absent in the Constitution of Malaysia, the Federal Court for the first time accepted, the

notion of privacy in its decision in *Sivarasa Rasiah v Badan Peguam Malaysia & Anor* [2010] 2 MLJ 333; [2010] 3 CLJ 507. The court was seized with a challenge to vires s 46A(1) of the Legal Profession Act 1976. The apex court while construing the art 5(1) of the Federal Constitution held that:

> It is patently clear from a review of the authorities that 'personal liberty' in art 5(1) includes within its compass other rights such as the right to privacy.

[56] This case shows that though the right to privacy is not enumerated as a fundamental right in our constitution but has been inferred from art 5(1) of the Federal Constitution. Thus, our constitution recognises the right to privacy unde art 5(1) of the Federal Constitution. The invitation by the plaintiff's counsel for this court to consider that, the right to privacy is a constitutional right must be treated cautiously. The defendants' counsel submitted that constitutional right is not actionable. In deciding on this issue, I need to consider the case of *Beatrice a/p At Fernandez v Sistem Penerbangan Malaysia & Ors* [2005] 3 MLJ 681, a landmark case in which the Federal Court ruled that:

> Constitutional law, as a branch of public law, deals with the contravention of individual rights by the Legislative or the Executive or its agencies. Constitutional law does not extend its substantive or procedural provisions to infringements of an individual's legal right by another individual.

[57] Thus recognition of such constitutional right may not be enforced by an individual against another individual for the infringement of rights of the private individual as Constitutional Law will take no recognisance of it. Applying this principle to this case, the plaintiff's claim must fail on this issue.

TORT OF INVASION OF PRIVACY

[58] The tort of invasion of privacy is not recognised tort under common law (see *Malone v Metropolitan Police Commissioner* [1979] Ch 344; *Kaye v Robertson and Another* (1990) Times, 21 March; [1991] FSR 62 (CA)). In Malaysia, *Ultra Dimension Sdn Bhd v Kook Wei Kuan* [2001] MLJU 751; [2004] 5 CLJ 285 held that there is no right to institute an action for invasion of privacy rights; *Lew Cher Phow @ Lew Cha Paw & Ors v Pua Yong Yong Anor Pua Keng Siang* [2009] MLJU 1331; [2009] 1 LNS 1256; *Dr Bernadine Malini Martin v MPH Magazines Sdn Bhd & Ors* [2006] 7 MLJ 561; [2006] 2 CLJ 1117. Contrary view was taken in the case of *Maslinda bt Ishak v Mohd Tahir bin Osman & Ors* [2009] 6 MLJ 826; [2009] 6 CLJ 653, the Court of Appeal gave light to the tort of invasion of privacy. In that the plaintiff was granted damages for the wrongdoing of the defendant. I must stress that, however, that case was not a case directly on point as to whether the tort of invasion of privacy, is recognised tort in Malaysia. The facts of the case shows humiliation, trauma and serious mental anguish were result of the photographing of her private parts.

[59] It is also recognised by this court that all the cases recognised the tort of invasion of privacy is limited to matter of private morality and modesty in particular women. *Lee Ewe Poh v Dr Lim Teik Man & Anor* [2011] 1 MLJ 835; [2010] 1 LNS 1162 is the first reported case recognising the invasion of privacy as an actionable tort. Basically the High Court relied on the decision of *Maslinda*'s case.

[60] Recognition of the right of privacy is comparatively recent development in the law of torts. Its extent, limitations and exceptions have varied in different countries either indicta or by decision, recognise the right as existing at common law and others recognise it only by constitution or statute. We cannot treat this matter lightly, the effect of the recognition of the privacy rights in Malaysia will be far reaching and may affect many things such as:

(a) the position of the admissibility in court proceedings of illegally obtained evidence which infringes an individual's right to privacy;

(b) the right to the media to report news regarding individuals;

(c) enforcement authorities right to conduct search on such as strip searches or search of vehicle or premises; and

(d) internet user's right such as the right to remain anonymous (note: bloggers have problem claiming anonymity pursuant to the case of *Author of a Blog v Times Newspapers Ltd* [2009] EWHC 1358 (QB) where the UK Court held that blogging is a public activity).

[61] Thus, the privacy issue surrounding the internet present a problem not only because the new technology of the internet has made invasions of privacy more frequent and more serious, and not only because the internet has made it possible to invade privacy in new and differently because the internet has changed our very conception of privacy itself. The privacy issue in this case that I need to address and determine is not the facts about one's private life.

BREACH OF CONFIDENCE

[62] The next cause of action relied by the plaintiff is under the law of breach of confidence relying on the authority of *Attorney General v Guardian Newspapers and others (No 2)* [1988] 3 All ER 545; [1990] 1 AC 109 and *Campbell v MGN Ltd* [2004] UKHL 22 submitted since the email information is private in nature and the defendants being in possession ought to have known that the information is confidential and misuse of such private information gave rise to valid cause of action. The plaintiff submitted the information are private and confidential. The defendants relying in the case of *Coco v AN Clark (Engineers) Ltd* [1969] RPC 41 submitted none of the three elements required by the case satisfied. The defendants submitted that the

plaintiff fails in limine as there is no pleading as to what information is confidential and why is the information confidential or private.

ANALYSIS AND DECISION

[63] The invasion of privacy involved here is email privacy. The email information in question as found in pp 226–251 of the CABD showed the rumours of the plaintiff's act of insubordination, contempt against the board of trustees of PAH and surreptitious moves to overthrow the administration of the hospital. The plaintiff himself admitted that all those emails are work related, affairs of the hospital and some about the defendants. It was an admission by the plaintiff that the emails were published at the board of trustees meeting held on 21 July 2011 which forms the basis for the dismissal of the plaintiff. It was also admitted by the plaintiff that the emails were not continued to be published apart from publishing by way of affidavit for court's purpose and used in the board of trustees' meeting.

[64] It is my finding that the plaintiff admitted that he at all time during or after termination of employment, must act with utmost confidentiality and not to disclose or divulge such an information to third party or make such information for his own behalf. This court found that all the emails information in question are about work related, affairs of the hospital and some about the defendants and therefore I hold that the defendants owed no duty of confidentiality. The devastating evidence is the admission of plaintiff that some of the emails sent by him during office hours and others were authored by Jan Bekker, Kelvin Tan and Shee Soon Chiew.

[65] It is my finding that it is nothing wrong for the first defendant as CEO to see and to use the email information in the course of his duty as CEO who is in the highest authority in the hospital and actually controls the hospital as far as policies are concerned. The plaintiff's main thrust of his claim is that his email account was hacked and there is an invasion of privacy because of this hacking and misuse of the hacked emails. The admission by the plaintiff that no evidence in the documents adduced showed that the first defendant or his agent hacked into his email account. This in itself weakened the plaintiff's case. It is my finding that there is an admission by the plaintiff that the second defendant had every right to bring up the emails with his fellow trustees of the board.

INIQUITY RULE

[66] An issue that is glaring in this case is that of plaintiff's culpability, that is, what is the relevance of the plaintiff who has something 'bad' and wants to prevent its publication by resorting an injunctive relief. I find that the

plaintiff's action has brought about the publicity affecting the defendants and the hospital. But, I am aware that even if a culpable plaintiff could be described as 'deserving' the publicity, it does not necessarily mean that the defendants are justified in possession and publication. The plaintiff's culpability does not act as a waiver of privacy. However, culpability nevertheless on the facts of this case should still be a consideration under the tort, as it operates in a manner similar to the defence of iniquity under the breach of confidence tort (see *Holyoake v Candy and another* [2017] EWHC 52 (QB)).

[67] As I have said earlier that the right to privacy and breach of confidence was an equitable remedy and equity fasten on the conscience of the plaintiff to enforce duties. The iniquity defence follows an equitable maxim 'he or she who comes into equity must come with clean hands'. In this plaintiff's conduct in respect of the information has been improper and this court is entitled to refuse relief that he prayed for. The iniquity is concerning fairness. In drawing the comparison, the plaintiff's culpability is relevant to an invasion of privacy claim because it might not be fair to allow plaintiff to rely on his privacy rights.

[68] In *Dato' Vijay Kumar Natarajan v Choy Kok Mun* [2010] 7 MLJ 215 at p 229 Mohd Hishamudin J (as he then was) in delivering the judgement of the court held:

> It is elementary that a person is not entitled to benefit from his own wrongdoing.

[69] The emails information has got nothing to do with the plaintiff, but involving the defendants and affairs of the hospital. I need to quote decision of Lord Denning in *Initial Services Ltd v Putterill and Another* [1967] 3 All ER 145 that:

> if the circular was misleading ... than it is at least arguable that it was in the public interest that should be made known

PUBLIC INTEREST

[70] My finding is that the emails containing 'injurious' material as to the defendants' character and affairs of the hospital, therefore it is in the public interest that it should be made known. In *Hubbard and another v Vosper and another* [1972] 1 All ER 1023, Myan LJ decided that injunction should be refused on the basis of that the plaintiff did not come to the court 'with clean hands'.

[71] In this case, the defendants had shown that there is a compelling public interest justifying its disclosure to the board of trustees and used in court proceeding. It is also established law that the public interest in the disclosure (to the appropriate authority) of iniquity will always outweigh the public interest

in the preservation of private and confidential information. The plaintiff being employee of the PAH and subordinates of the defendants is subjected to the duty of fidelity and good faith which demands that the employee be loyal to his employer to refrain from misusing or from disclosing to another of confidential information.

[72] Does the right to privacy gives the plaintiff the right to abuse/offend the defendants and the administration of the hospital? Surely equity cannot afford protection to the plaintiff who emailed to his friends about wrongful and offensive information about the defendants and hospital. In fact the email is about humiliation, severe embarrassment and it is infringement of the privacy of the defendants' personal life. On the facts of this case, the plaintiff's protection as to the privacy ought to be forfeited.

[73] Finally, it is my finding that the email information does not attribute to the plaintiff. No publication about him. No evidence of any harm or serious effect on the plaintiff. Surely he is not embarrassed by the publication. I can conclude that the plaintiff had no reasonable expectation of privacy and the publication would not have been actionable.

[74] With regard to the ground of breach of confidence, I find that the fact that the information was possessed even by surreptitious means, does not mean that the information was confidential. The law of confidence only applies to information which substantially concerns the plaintiff.

[75] It is my considered view that the plaintiff loses his substantive due process of right to privacy once the information is revealed to a third party. The breach of confidence could not be sustained because the email information was sent/disseminated by the plaintiff to his friends, in such circumstances not possible to contend that they were private or confidential.

[76] The defendants have not acted unlawfully in publishing the emails information that were in their possession. No evidence that the defendant involved in the hacking of the emails. I find that in this case, public interest outweighs the competing rights of those who wrote them. People have no right to keep secret communication which reveal wrongdoing of others.

CONCLUSION

[77] On the above consideration and on the balance of probabilities, the court is satisfied that the plaintiff has failed to prove his claim against the defendants and in the premises the plaintiff's claim is dismissed with costs.

Claim dismissed.

Reported by Ashok Kumar